

1 Abran E. Vigil (NV 7548)  
2 vigila@ballardspahr.com  
3 BALLARD SPAHR LLP  
4 1980 Festival Plaza Drive, Suite 900  
5 Las Vegas, NV 89135-2958  
6 Tel.: 702-471-7000  
7 Fax: 702-471-7070

8 Logan D. Smith (*Pro Hac Vice*)  
9 lsmith@mcnamarallp.com  
10 Sanjay Bhandari (*Pro Hac Vice*)  
11 sbhandari@mcnamarallp.com  
12 McNAMARA SMITH LLP  
13 655 West Broadway, Suite 900  
14 San Diego, California 92101  
15 Tel.: 619-269-0400  
16 Fax: 619-269-0401  
17 *Attorneys for Court-Appointed Monitor,*  
18 *Thomas W. McNamara*

19 UNITED STATES DISTRICT COURT

20 DISTRICT OF NEVADA

21 FEDERAL TRADE COMMISSION,

22 Plaintiff,

23 v.

24 AMG SERVICES, INC., et al.,

25 Defendants, and

26 PARK 269 LLC, et al.,

27 Relief Defendants.

28 Case No. 2:12-cv-00536-GMN-VCF

MONITOR'S REQUEST FOR STATUS  
CONFERENCE RE: DECISION OF THE  
SUPREME COURT IN *AMG CAPITAL  
MANAGEMENT, LLC V. FEDERAL  
TRADE COMMISSION, NO. 19-508*

1       On November 28, 2016, the Federal Trade Commission (“FTC”) and Defendants Scott  
 2 Tucker, AMG Capital Management, LLC, Level 5 Motorsports, LLC, Black Creek Capital  
 3 Corporation, and Broadmoor Capital Partners, along with Relief Defendants Kim Tucker and  
 4 Park 269, LLC (collectively, “Defendants”), filed a joint motion to enter a Stipulated Order  
 5 Appointing Monitor and Freezing Assets. *See* ECF No. 1095. Two days later, on November 30,  
 6 the Court entered their proposed order appointing Thomas W. McNamara as the Monitor in this  
 7 action. *See* ECF No. 1099 (the “Monitor Order”). His appointment was the stipulated result of  
 8 negotiations between the parties and was not premised on Section 13(b) of the FTC Act. Rather,  
 9 the Monitor was appointed pursuant to the Court’s “broad powers and wide discretion to  
 10 determine relief in an equity receivership” or monitorship. *See S.E.C. v. Wells Fargo Bank, N.A.*,  
 11 848 F.3d 1339, 1343-44 (11th Cir. 2017); *see also S.E.C. v. Wencke*, 622 F.2d 1363, 1369 (9th  
 12 Cir. 1980).

13       Soon after the Monitor’s appointment, Defendants appealed this Court’s summary  
 14 judgment rulings (ECF Nos. 584 and 1057). After the Supreme Court granted certiorari, this  
 15 Court stayed a number of actions related to the instant case, which are referred to herein as the  
 16 “Related Actions.”<sup>1</sup> The Supreme Court issued its decision on Defendants’ appeal roughly one  
 17 week ago, on April 22, 2021, the result of which was the effective narrowing of the scope of the  
 18 FTC’s powers under Section 13(b). *See AMG Cap. Mgmt., LLC v. FTC* (“AMG”), No. 19-508,  
 19 slip op. This Court previously directed the Monitor to file joint petitions in the stayed Related  
 20 Actions to lift the stays once the Supreme Court issued an opinion. Defendants in the Related  
 21 Actions have indicated that they will argue in these joint petitions that the cases must be  
 22 immediately dismissed in light of the *AMG* decision.

23       The Monitor understands that dismissal of at least some of the Related Actions may be  
 24 the ultimate result of the *AMG* decision. Any action in those cases prior to this Court reacquiring

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25       <sup>1</sup> Those cases are: *Thomas W. McNamara v. Charles Hallinan, et al.*, Case No. 2:17-cv-02966;  
 26 *Thomas W. McNamara v. Linda Hallinan, et al.*, Case No. 2:17-cv-02967; *Thomas W.*  
 27 *McNamara v. Gary Patten, et al.*, Case No. 2:17-cv-02968; *Thomas W. McNamara v. Selling*  
*Source, LLC, et al.*, Case No. 2:17-cv-02969; *Thomas W. McNamara v. Stealth Power, LLC*,  
 28 Case No. 2:18-cv-01813; and *Thomas W. McNamara v. Intercept Corporation, et al.*, Case No.  
 2:18-cv-02281.

1 jurisdiction (and making careful determinations concerning the *AMG* decision's impact on the  
 2 Monitor Order) would be premature, however. The case has not yet been remanded to the Ninth  
 3 Circuit, let alone this Court, and remand in this case will be more than just a procedural  
 4 formality. The Court will need to make decisions as to whether, and how, the Monitorship  
 5 should continue or wind down. Lifting the stays in the Related Actions before these key  
 6 decisions have been made will negatively impact the Monitor's ability to perform his core duties,  
 7 which will necessarily *remain* his duties until the Court has provided him with further direction.  
 8 Should the stays be lifted prematurely, the Monitor's counsel will almost certainly have to  
 9 complete additional and unnecessary briefing in six separate actions – an expense which is not in  
 10 line with the Monitor's duty to “preserve the value of the assets under the Asset Freeze” under  
 11 the Monitor Order (ECF No. 1099). *See id.* at § VIII.B.

12 What the Monitorship looks like post-remand remains an open question. While the nexus  
 13 between the Court's summary judgment rulings and the Monitor's appointment is self-evident,  
 14 the Court's power to appoint a monitor or receiver is not dependent upon the FTC's authority to  
 15 seek disgorgement under Section 13(b), which was the issue addressed in the *AMG* decision.  
 16 The Ninth Circuit recognized this very distinction in a case brought by the SEC, holding:

17       The power of a district court to impose a receivership or grant other forms of  
 18 ancillary relief does not in the first instance depend on a statutory grant of power  
 19 from the securities laws. Rather, the authority derives from the inherent power of  
 20 a court of equity to fashion effective relief.

21       *Wencke*, 622 F.2d at 1369. Similarly, nowhere does Section 13(b) give the Court authority to  
 22 appoint a monitor or receiver; rather, that authority comes from the Court's “broad powers and  
 23 wide discretion to determine relief in an equity receivership” as noted above. *See FTC v. MOBE*  
 24 *Ltd.*, No. 6:18-cv-862-ORL-37DCI, 2018 WL 4960232, at \*3 (M.D. Fla. Aug. 8, 2018). Those  
 25 powers are further enhanced when, as here, a federal agency is involved. *See id.*

26       While the *AMG* decision will certainly affect the scope of the Monitor's authority, it has  
 27 not invalidated his appointment. The Court will need to exercise its “inherent power[s]” post-  
 28 remand to determine the shape of the Monitorship going forward. Rather than have the stays be  
 lifted and the Related Actions lurch forward on differing timetables, the Monitor requests that

1 the Court continue the stays and set a status conference post-remand to address the *AMG*  
2 decision's impact on the Monitor Order in this case,<sup>2</sup> which would give all of the interested  
3 parties (*e.g.*, the FTC, Scott Tucker, etc.) an opportunity to brief the relevant issues.

4 Dated: April 30, 2020

McNAMARA SMITH LLP

5 By: /s/ Logan D. Smith

6 Logan D. Smith (*Pro Hac Vice*)  
lsmith@mcnamarallp.com  
7 Sanjay Bhandari (*Pro Hac Vice*)  
sbhandari@mcnamarallp.com  
8 655 West Broadway, Suite 900  
San Diego, California 92101  
Tel.: 619-269-0400  
Fax: 619-269-0401

9  
10 Abran E. Vigil (NV 7548)  
11 vigila@ballardspahr.com  
12 BALLARD SPAHR LLP  
13 1980 Festival Plaza Drive, Suite 900  
Las Vegas, NV 89135-2958  
Tel.: 702-471-7000  
Fax: 702-471-7070

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15 *Attorneys for Court-Appointed Monitor,*  
Thomas W. McNamara

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29 <sup>2</sup> The Monitor will file notices of this filing (with this filing attached) in the Related Actions.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of April, 2021, pursuant to Fed. R. Civ. P. 5(b), I served via CM/ECF or delivered by email and mailing in the U.S. Mail a true and correct copy of the foregoing **MONITOR'S REQUEST FOR STATUS CONFERENCE RE: DECISION OF THE SUPREME COURT IN AMG CAPITAL MANAGEMENT, LLC V. FEDERAL TRADE COMMISSION, NO. 19-508**, postage prepaid and addressed to the following:

**VIA CM/ECF**

Kimberly L. Nelson  
Federal Trade Commission  
600 Pennsylvania Ave. NW  
Mail Stop CC-9528  
Washington, DC 20580  
Tel.: 202-326-3304  
Fax: 202-326-3197  
Email: knelson@ftc.gov  
*Attorneys for FTC*

VIA CM/ECF

Paul C. Ray  
Paul C. Ray, Chtd.  
8670 West Cheyenne Avenue, Suite 130  
Las Vegas, NV 89129  
Tel.: 702-823-2292  
Fax: 702- 823-2384  
Email: paulcraylaw@gmail.com  
*Attorneys for AMG Capital Management, LLC;  
Level 5 Motorsports, LLC; Black Creek  
Capital Corporation; Broadmoor Capital  
Partners, LLC; Scott A. Tucker; Park 269 LLC*

## VIA EMAIL

Kim Tucker  
7118 Village Drive  
Prairie Village, KS 66208  
[kim@kmtucker.net](mailto:kim@kmtucker.net)  
*Pro Se*

/s/ Logan D. Smith

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**Logan D. Smith**  
*Attorneys for the Court-Appointed Monitor,  
Thomas W. McNamara*